85-1297

Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1985

ISAAC MANEGO,
PETITIONER,

v.

THE ORLEANS BOARD OF TRADE,
CAPE COD FIVE CENTS SAVINGS BANK,
AND DAVID B. WILLARD,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I.

QUESTIONS PRESENTED

1. Whether res judicata, arising out of Summary Judgment for private defendants and municipal licensing officials in a prior Civil Rights action, alleging a conspiracy to deny petitioner's entertainment license, appropriately bars an anti-trust action against the same private Defendants who engage in a different conspiracy with different parties (a local Board of Trade) in violation of the Sherman Anti-Trust Act, Section 1.

2. Are such concerted activities protected under the Noerr-Pennington Doctrine, where the municipal licensing officials have attended and participated, as members, in meetings of a local Board of Trade held to oppose and vote unanimously against granting petitioner's entertainment license?

II

PARTIES BELOW

The parties below are Isaac Manego, plaintiff-petitioner, and the Orleans Board of Trade and Cape Cod Five Cents Savings Bank, and David B. Willard, defendants-respondents.

TABLE OF CONTENTS

Questions Presented I
Table of Contents III
Table of Authorities IV
Opinions Below 1
Jurisdiction 2
Statutory Provisions Involved 2
Statement of the Case 2
Reasons for Granting the Writ 5
Conclusion 12
Appendix:
Memorandum of the United States District Court for the District of Massachusetts, dated November 27, 1984 ..... A-1
Order of the United States District Court for the District of Massachusetts, dated November 27, 1984, Ordering That Respondents' Motion for Summary Judgment Be Granted A-15
Opinion of the United States Court of Appeals for the First Circuit, dated September 3, 1985 ..... A-16
Judgment of the United States Court of Appeals for the First Circuit, dated September 3, 1985, Affirming the Judgment of the United States District Court for the District of Massachusetts A-29
Title 15, Section 1 (Sherman Anti-Trust Act) A-30
Order of the Court Extending Time To File Petition for Writ of Certiorari Until January 31, 1986 ..... A-31

Table of Authorities

Cases

Allen v. *Greenville County*, 712 F.2d 934 (4th Cir. 1983) 7, 8
California Motor Transport v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972) 10
Federal Prescription Service v. *American Pharmaceutical Association*, 663 F.2d 255, (D.C. Cir. 1981) 10
First Alabama Bank v. *Parsons Steel, Inc.*, 747 F.2d 1367 (11th Cir. 1984) 9
Hagee v. *City of Evanston*, 729 F.2d 510 (7th Cir. 1984) 8
Harris v. *Jacobs*, 621 F.2d 341 (9th Cir. 1980) 8, 9
Kutzik v. *Young*, 730 F.2d 149 (4th Cir. 1984) 7
Manego v. *Cape Cod Five Cents Savings Bank et al.*, 692 F.2d 174 (1st Cir. 1982) 3
Manego v. *Orleans Board of Trade et al.*, 773 F.2d 1 (1st Cir. 1985) 5
N.L.R.B. v. *United Technologies Corporation*, 706 F.2d 1254 (2d Cir. 1983) 7
Page v. *United States*, 729 F.2d 818 (D.C. Cir. 1984) 9
Poe v. *John Deere Co.*, 695 F.2d 1103 (8th Cir. 1984) 6
Prospero Associates v. *Burroughs Corporation*, 714 F.2d 1022 (10th Cir. 1983) 9
Southmark Properties v. *Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984) 6
Tucker v. *Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981) 7
United States v. *Athlone Industries, Inc.*, 746 F.2d 977 (3d Cir. 1984) 7
Westwood Chemical Co., Inc. v. *Kulick*, 656 F.2d 1224 (6th Cir. 1981) 8
Young Engineers v. *U.S. International Trade Commission*, 721 F.2d 1305 (D.C. Cir. 1983) 6

Statutory Provisions

15 U.S.C. §51 (Sherman Anti-Trust Act) 2, 3, 12
28 U.S.C. 1254(1) 2

Miscellaneous

Cornell Law Review (1985) Vol. 70, No. 4, p. 603 *et seq.* 5
1B *Moore's Federal Practice*, Par. 0.410(1) at 350 ..... 5, 6
Restatement 2d, Judgments §24 ..... 5, 6, 9
Wright & Miller, *Federal Practice and Procedure*, §4407 ..... 6, 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment, and opinion of the United States Court of Appeals for the First Circuit entered in this matter on September 3, 1985.

Opinions Below

The September 3, 1985 opinion of the Court of Appeals, whose judgment herein is sought to be reviewed, is reported at 773 F.2d 1 and is reprinted in the separate Appendix to this Petition (A-16). The prior opinion of the United States District Court for the District of Massachusetts, also reprinted in the Appendix, is reported as follows: 598 F.Supp. 231 (A-1).

Jurisdiction

The judgment of the Court of Appeals was entered on September 3, 1985. On November 30, 1985, Mr. Justice Brennan entered an order extending the time for the filing of this petition to and including January 31, 1985. (A-31). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

This case involves Title 15, United States Code, Section 1, which provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Statement of the Case

Petitioner had brought a series of independent actions against various defendants, arising out of the participation of those defendants in several allegedly unlawful and concerted activities, which had the purpose to prevent petitioner from establishing and operating a disco business in the Town of Orleans, Massachusetts.

The first action sought a writ in the nature of mandamus from the Superior Court in Barnstable alleging that an Orleans Board of Selectmen's decision to deny petitioner an entertainment license was arbitrary and capricious, because it was

based on racial hostility evident in the community against petitioner, a black man. Summary judgment for defendants was granted without memorandum on August 18, 1979.

The second action was a civil rights complaint brought July 1, 1980, in the U.S. District Court for the District of Massachusetts under Federal Civil Rights laws, namely, 42 U.S.C. §1981; 42 U.S.C. §1983; 28 U.S.C. §1331; 42 U.S.C. §1985, §1986 and §1988. The suit named as defendants, the Cape Cod Five Cents Savings Bank, Inc.; George P. Marble, David B. Willard; T-Bears, Inc., d/b/a Lower Cape Sports Center, Paul M. Thibert; and Gaston L. Norgeot, Herbert F. Wilcox, Thomas B. Nickerson, individually and as they are members of the Board of Selectmen of the Town of Orleans. On April 13, 1982, summary judgment was granted to all defendants, which judgment was taken on appeal by petitioner to the First Circuit. On October 28, 1982, the First Circuit affirmed the District Court's judgment, *Manego* v. *Cape Cod Five Cents Savings Bank, Inc.*, 692 F.2d 174 (1st Cir. 1982). In the memorandum accompanying this judgment the First Circuit Court stated, "had petitioner in this case provided sufficient facts to create a material issue as to whether the denial of this license was because of his race, we would, as did the Court in *Adickes*, look unfavorably on a refusal by the Lower Court to allow him to pursue his claim that the denial was the result of conspiracy."

Thereupon, petitioner filed on January 7, 1983, an action in the U.S. District Court for the District of Massachusetts, pursuant to the Sherman Antitrust Act, 15 U.S.C. §1 (A-30), alleging that the Orleans Board of Trade (comprising more than 90 Orleans businessmen) unlawfully conspired with the Cape Cod Five Cents Savings Bank and David Willard, in restraint of trade, to prevent petitioner from establishing and operating a disco business in the Town of Orleans.

In this case, petitioner furnished to the District Court, depositions, answers to interrogatories, affidavits, and other

documents, including the official Minutes of the meeting purporting to show that the Board of Trade did meet on January 9, 1979, and under the direction of its President, David Willard, thoroughly discussed and voted unanimously to oppose petitioner's application for an entertainment license; that the interests of the Bank, the Lower Cape Sports Center, and the Board of Trade were interlocked through the status of David Willard, who at the time was simultaneously Manager of the Bank, General Manager of the Sports Center, and President of the Orleans Board of Trade; that Orleans Selectmen Gaston Norgeot and Thomas Nickerson, who were also members of the Board of Trade, were actually present and participated in the Board of Trade Meeting held on January 9, 1979; that Selectman Thomas Nickerson was again present at another Board of Trade Meeting held on February 13, 1979, and reported on the scheduled hearing of the Board of Selectmen to be held on the following night, February 14, 1979, on petitioner's application for an entertainment license; that petitioner's application was denied at that hearing; that the Lower Cape Sports Center, owned by the Bank, subsequently sought and obtained from the Board of Selectmen a new entertainment license in order to expand its program into live music and dancing, and roller disco; and that in May, 1979, the bank had brought and then withdrew on July 3, 1979, a sham lawsuit against petitioner and the Orleans Board of Appeals to enjoin petitioner from proceeding with the completion of his building and to revoke his Building Permit.

On November 27, 1984, the U.S. District Court granted summary judgment to defendants, the Bank, and David Willard, on the ground that this action was barred by the Court's judgment in the prior Civil Rights case, and also granted summary judgment for the Orleans Board of Trade because their conduct was protected by the Noerr-Pennington Doctrine.

The First Circuit Court of Appeals affirmed the District Court judgment on September 3, 1985 (A-16).

Reasons for Granting the Writ

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS CONCERNING DEFINITION AND APPLICATION OF RES JUDICATA.

Is the "transactional approach" to res judicata, as set forth in Restatement 2d, Judgments §24, on which the lower court based part of its ruling, an appropriate policy for the First Circuit Court to adopt, both for the instant matter in particular and the First Circuit in general, in "limiting access to adjudication by developing expansive preclusion doctrines?" *Cornell Law Review* (1985) Vol. 70, No. 4, p. 603 *et seq.*

For the purposes of the doctrine of res judicata, also referred to as claim preclusion, the definition of "cause of action" has always been troublesome. 1B *Moore's Federal Practice* par. 0.410(1), at 350. This difficulty is reflected in the variety of phrases and methods utilized by the courts to explain the doctrine. The result can be inconsistencies both within and among the Circuits as well as injustices to innocent plaintiffs caught in a web of ambiguity. Further, with the entire federal judicial system suffering from an enormous overload and resulting backlog of cases, it would be of inestimable value to these courts, the system which supports them, and those who seek justice through them to have the issue in question resolved.

A fair and uniform understanding of the doctrine of res judicata is presently lacking in the federal courts, as will be shown below. The within petitioner believes he has been harmed by this absence of uniformity. With the instant action, he seeks a definitive ruling on the subject by the United States Supreme Court, which ruling will benefit him and countless others.

The decision below, *Manego v. Orleans Board of Trade et al.*, 773 F.2d 1 (1st Cir. 1985) (A-16), included a ruling by the Appeals Court in which it "officially embraced" (A-23) for the first time the transactional approach to claim preclusion as

defined in the Restatement (Second) of Judgments §24. *Id.* This same position has been taken by the Fifth Circuit: "...This Circuit has adopted the transactional test of the Restatement (Second) of Judgments." *Southmark Properties* v. *Charles House Corporation*, 742 F.2d 862, 870 (5th Cir. 1984). The Eighth Circuit has also embraced the Restatement. In *Poe* v. *John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982), that court said, "We believe this (the Restatment (Second) of Judgments §24) is the correct approach." Without making an actual statement of adoption, so too did the Federal Circuit, see *Young Engineers* v. *U.S. International Trade Commission*, 721 F.2d 1305, 1314 (D.C. Cir. 1983).

The Restatement's transactional approach is seen by many courts and scholars as the "present trend" in claim preclusion law. E.g., 1B *Moore's Federal Practice*, supra, 359; Wright and Miller, *Federal Practice and Procedure* §4407, at 55 and fn. 13. Nonetheless, only four of the Federal Circuits have formally adopted it. Many of the Circuit Courts have taken on definitions of "cause of action" which are markedly similar to the Restatement, falling just short of embracing §24 as their standard. Given that the Restatement is designed specifically to unify the law throughout the country, and given that so many of the definitions of "cause of action" are so similar to §24 and to each other, it is noteworthy that these Circuits have not yet adopted the Restatement's transactional approach. In so doing, are they, or any of them, intending to retain some subtle distinction from the Restatement or from the other Circuits? A brief summary of the positions recently taken by the various Circuit Courts will demonstrate these subtle, yet meaningful, distinctions.

The Second Circuit uses the Restatement and adds to it:

> Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the

> same evidence was needed to support both claims, and whether the facts essential to the second were present in the first.

N.L.R.B. v. *United Technologies Corporation*, 706 F.2d 1254, 1260 (2d Cir. 1983). This circuit seems concerned with more factors than the Restatement's transactional test. Two years earlier, the same court required not only the same evidence and "essential facts" between the first and second actions, but also inquired whether ". . . a different judgment in the second action would impair rights or interests created by the first judgment." *Tucker* v. *Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981). So as to emphasize its case by case approach, that court asserted, "The fact that several operative facts may be common to successive actions between the same parties does not mean that a judgment in the first will always preclude litigation of the second." *Id.*

The Third Circuit is also careful to point out that " 'cause of action' cannot be precisely defined, nor can a simple test be cited. . ." *United States* v. *Athlone Industries, Inc.*, 746 F.2d 977, 983-984 (3d Cir. 1984). It then holds that *res judicata* turns on "the essential similarity of the underlying events." *Id.* In that case the court considers the acts complained of, the theories of recovery and the evidence necessary to sustain both actions.

The Fourth Circuit does not seem to have articulated a unified definition of "cause of action"; it looks to its states' positions. E.g., in *Kutzik* v. *Young*, 730 F.2d 149, 152 (4th Cir. 1984), the test in Maryland was "whether the same evidentiary facts would sustain both suits." An interesting dissent the year before demonstrates some confusion in that Circuit. In *Allen* v. *Greenville County*, 712 F.2d 934 (4th Cir. 1983), a dissenting Justice argued that while the majority may have based its opinion on the Restatement's transactional approach, by his reading,

> . . .South Carolina has traditionally and still applies the classically more narrow view. . . Under that view, successive claims are the "same" claim for *res judicata* purposes only: "if the same facts or evidence would sustain both". . .and if both involve the same primary right of the plaintiff and duty of the defendant.

Id., at 935-936.

An earlier Sixth Circuit opinion, *Westwood Chemical Co., Inc.* v. *Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981), posited yet another variation: ". . .identity of the facts creating the right of action and of the evidence necessary to sustain each action."

The Seventh Circuit has openly acknowledged a split of opinion on this subject within its bounds. In the decision *Hagee* v. *City of Evanston*, 729 F.2d 510 (7th Cir. 1984), the Circuit Court discussed at length the two "different formulations of the test to determine whether two suits involve the same cause of action". *Id.*, at 512-513. They found no clear trend in any direction among these Illinois cases. The two tests used were the "proof" approach, e.g., whether the same evidence would sustain both actions, and the transactional approach. In the words of the court, "These two approaches can lead to different results." *Id.*, at 513. The Circuit Court seemed to base its final decision on whether the two cases were based on the "same set of facts." *Id.*, at 514.

The prevailing law in the Ninth Circuit on this issue was laid down in *Harris* v. *Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980). According to this case, four questions must be asked:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. *Jacobs*, *supra*, also established that there is no precise or simple test that can be applied in determining what constitutes a claim. Examination of all these factors can surely produce different results than the transactional approach alone.

The Tenth Circuit also appears to lack a unified standard, although in *Prospero Associates* v. *Burroughs Corporation*, 714 F.2d 1022, 1027 (10th Cir. 1983), the court notes Colorado's adherence to the "transactional analysis approach".

According to the Eleventh Circuit, the question turns on whether the "operative nucleus of fact" was the same in the two actions. *First Alabama Bank* v. *Parsons Steel, Inc.*, 747 F.2d 1367, 1375 (11th Cir. 1984).

Similarly, the D.C. Circuit looks to the "nucleus of facts", or the "facts surrounding the transaction or occurrence". *Page* v. *United States*, 729 F.2d 818, 820 (D.C. Cir. 1984).

It can be seen from the above that there are indeed subtle and yet meaningful differences among the various Federal Circuits' approaches to the definition of "cause of action" for the purposes of the doctrine of *res judicata*. Two further observations can be made. First, where these definitions strayed from that of the Restatement (Second) of Judgments §24, they did not reject the Restatement's formulation but rather often added to it. Second, a common refrain heard throughout the Circuits is that there is no one, simple formula for determining what constitutes a "cause of action".

If the Restatement's transactional approach errs, it errs on the side of overbreadth. See Wright & Miller *Federal Practice and Procedure* §4407. By emphasizing the impossibility of a precise definition of "cause of action" and adding criteria to the Restatement's test, which in effect narrows its reach, the Circuit Courts are reacting to that overbreadth. They are attempting to correct its failings and arrive at a more balanced, realistic and fair approach to the issue.

A possible danger in the use of the restatement in res judicata is the difficulty courts find in defining terms such as "operative nucleus of facts," or to provide a clear and unambiguous standard for determining which facts are to be included in an operative nucleus, and which excluded. Often the choice seems arbitrary. For example, is the fact that parties are different in the two cases of fact to be included in or excluded from the "operating nucleus"? Whatever choice is made would seem to predetermine the result.

The petitioner in the case at bar believes that, if he had brought his action in a Circuit other than the First, which has adopted the Restatement as its standard, there might have been a different result. Because he believes this situation to be arbitrary and unfair, he now seeks a definitive ruling on the issue by the United States Supreme Court. For only with a uniform and unified position on this doctrine will the Circuit Courts be able to clear their dockets most efficiently and mete out justice most fairly.

II. Equal and Meaningful Access to the Licensing Process Is Denied When Municipal Licensing Officials Conspire With Local Boards of Trade To Deny Licensing Applications in Violation of Section I of the Sherman Antitrust Act. Such Conduct Is Unprotected by the Noerr-Pennington Doctrine.

In *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508 (1972), 92 S.Ct. 609, the Court listed, at 512-514, several types of unethical conduct that can result in Antitrust violations, among them, conspiracy with a license authority. The Court indicated that evidence of such activity may infer sham activity sufficient to remove it from the first amendment protection of the Noerr-Pennington Doctrine.

In *Federal Prescription Service* v. *American Pharmaceutical Association*, 663 F.2d 255 (D.C. Cir. 1981), *cert. denied* 455 U.S. 298 (1982), 102 S.Ct. 1293, the Circuit Court held that

"mere membership" by the licensing authorities in a trade association is not sufficient to prove conspiracy. In that case no evidence was presented that the licensing authority attended or participated in association meetings.

However, more than "mere membership" is involved in the matter here presented for review by petitioner. Here membership is coupled with knowledge, notification, presence and participation by members of the Orleans Board of Selectmen who, as also members of the Orleans Board of Trade, attended its January 1979 meeting (A-27).

The licensing officials were present as petitioner's application for an entertainment license was discussed at the Board of Trade meeting "in a wide-ranging and thorough manner." They were present when the ninety members of the Board of Trade voted unanimously to oppose petitioner's application. Petitioner was not a member of the Board of Trade nor was he invited to attend its meetings.

Such evidence of participation permits a reasonable inference of concerted activity by the Board of Trade to oppose petitioner's license application. Further, the spectacle of the Selectmen's participation in the Board of Trade's meeting also permits the inference that all meaningful access was denied to petitioner to the public license hearings later to be conducted by the already-committed Selectmen.

The ubiquity of local boards of trade (also styled "chambers of commerce" in certain localities) in nearly every city and town throughout our nation, coupled with their pervasive economic interests in their local business communities, as well as their frequent interlocking memberships in common with municipal licensing boards, at once places them in a position to exercise a strong and overwhelming influence upon the decision of who shall be admitted and who shall not be admitted to trade or commerce in the local business community.

In so acting as self-appointed keepers of the gates, their powerful influence may indeed serve the interests of the community. Yet it may also be exercised as here, in restraint of trade in violation of Section I of the Sherman Antitrust Act to exclude, from entry into the business community, persons whose entry may pose a threat of economic competition to the businesses of certain members of that same local Board of Trade, especially where like petitioner, they are persons of the Negro race, or of other undesired minorities.

Thus, such Board of Trade activity as is here complained of by petitioner when combined with the active and direct participation of licensing officials, sets in motion an inevitable collision between the protections contemplated by the First Amendment guarantees of the right of petition and free speech, on the one hand, and the right of persons like petitioner to exercise their right of equal opportunity to enter into trade or commerce in the local business community, and to have meaningful access to the licensing process, free from any restraints prohibited by Section I, of the Sherman Antitrust Act.

Conclusion

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
NO. 83-0045-C

ISAAC MANEGO,
PLAINTIFF,
v.
THE ORLEANS BOARD OF TRADE, ET AL,
DEFENDANTS.

MEMORANDUM
November 27, 1984

CAFFREY, CH. J.

This is a civil action brought pursuant to the Sherman Antitrust Act, 15 U.S.C. §§ 1-15, which includes a pendant state law claim for unfair business practices. M.G.L. c.93A. The plaintiff, Isaac Manego, alleges that the defendants conspired to orchestrate the denial of license applications, thereby producing an adverse anticompetitive effect. The defendants are David Willard, The Cape Cod Five Cents Savings Bank ("Bank"), the Orleans Board of Trade ("Board of Trade"), and its members. At times relevant to the events complained of, defendant Willard was both the President of the Board of Trade and an officer of the Bank. The case is now before the court on defendants' motions for summary judgment. Fed. R. Civ. P. 56(b).

This case is the third round of litigation initiated by plaintiff relating to the denial of his application for entertainment and liquor licenses in the Town of Orleans, Massachusetts. In the first case, *Mangeo* v. *Board of Selectmen of the Town of Orleans*, C.A. No. 38824 ("*Manego I*"), the plaintiff sought a writ of mandamus from the Massachusetts Superior Court. Upon dismissal of that action, plaintiff instituted his second case, a civil rights action in this Court, *Manego* v. *Cape Cod*

Five Cents Savings Bank, et al, C.A. No. 80-1406-MC (D.Mass. April 13, 1982) ("*Manego II*") which terminated in summary judgment for the defendants. The Court of Appeals affirmed. *Manego* v. *Cape Cod Five Cents Savings Bank*, 692 F.2d 174 (1st Cir. 1982).

In substance, the plaintiff's present complaint is based on and addresses the same events that were the subject of both the earlier cases. In early 1979, the Orleans Board of Selectmen denied the plaintiff's applications for the liquor and entertainment licenses necessary to operate a proposed disco. The plaintiff alleges that his application was denied as a result of a conspiracy among the defendants, including the Board of Trade, the Bank, and David Willard. The alleged purpose of the conspiracy was to allow the Bank, through a sham transaction, to offer similar entertainment at the nearby Lower Cape Sports Arena ("Arena") free of competition from Mr. Manego. Indeed, it is undisputed that an entertainment license was issued to the Arena after the denial of plaintiff's application.

Defendants Cape Cod Five Cents Savings Bank and David Willard were also defendants in Manego II. The Orleans Board of Trade was not named as a defendant in the earlier actions, and a reference to Willard's status as president of the Board was stricken from the complaint on defendant Bank's motion.

Defendants Cape Cod Five Cents Savings Bank And David Willard

Defendants Willard and the Bank move for summary judgment on grounds that the plaintiff's action is barred under the doctrine of *res judicata* and on the grounds that the alleged conspiratorial acts are protected by the First Amendment.

Under the doctrine of *res judicata*[1] "a final judgment on the

[1] In this area of law both courts and commentators have been inconsistent in their use of terminology. For purposes of clarity, I use the term "claim preclusion" to describe the preclusive effect of a judgment on the merits between

merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). *Res judicata* is a bar only where the subsequent case concerns the same cause of action or claim. *E.g. Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). With the adoption of the Federal Rules of Civil Procedure the concept of "cause of action" has broadened beyond that of a single legal issue narrowly drawn in a writ. *See* 18 J. Wright, Miller & Cooper, Federal Practice and Procedure §4407 n.20. The scope of preclusion has necessarily expanded with the definition of "claim" or "cause of action." *Id.*

The exact contours of claim preclusion are a subject of much discussion and disagreement. *See Id.*, 18 J. Moore, Moore's Federal Practice ¶0.410[1]. The Restatement (Second) of Judgments (1982) adopts a "transactional" definition of the scope of issue preclusion:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis the litigative unit and may not be split.

Restatement (Second) §24 Comment a.

A number of other approaches to the preclusive scope of an earlier action have evolved in the case law. These include:

— Whether the actions are based on identical grounds.

— Whether the factual basis of both claims is the same.

— Whether the essential facts and issues have been similarly presented in both cases.

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parties or their privies in the same cause of action. "Issue preclusion" or "collateral estoppel" describes the preclusive effect of a prior judgment on an issue of law or fact in a different cause of action involving a party. "*Res judicata*" is a general term which applies to both types of preclusion.

> — Whether the same right is infringed by the same wrong.
>
> — Whether the wrong for which redress is sought is the same in both actions.
>
> — Whether the two actions are so similar that a different judgment in the second would destroy or impair rights or interests established in the first.

21 Federal Procedure Lawyers Edition §51:201.

The Court of Appeals for the First Circuit has articulated a position closer to the broad restatement view.[2] *Isaac* v. *Schwartz*, 706 F.2d 15 (1st Cir. 1983), *Lovely* v. *Liberte*, 498 F.2d 1261 (1st Cir. 1974). In *Lovely*, the Court of Appeals held that a state court action for possession barred a subsequent §1983 action because the parties were the same and concerned the same "operative nucleus of fact." *Id.* at 1263. In *Issac* the Court went further in its analysis:

> Given the initial dismissal, the issue before us is simply whether the new complaint grows out of the same transaction or series of connected transactions (Restatement (Second) of Judgments §24) as the old complaint. If so, the fact that appellant now asserts new legal theories . . . does not help him.

Supra at 17. Recently the Court of Appeals reaffirmed this approach in *Casagrande* v. *Agoritsas*, No. 84-1396 (1st cir. Nov. 19, 1984).

I note that plaintiff Manego alleges facts in this antitrust action which are strikingly similar to those in *Mangeo II*. The present complaint differs only in that it names additional defendants (the Board of Trade), and alleges that the Bank planned to offer entertainment of its facility similar to that which plaintiff Manego would have provided at his disco.

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[2] Because the prior actions in *Schwartz*, *Roy* and *Lovely* took place in state courts, state *Res Judicata* principles were applied. In *Schwartz* the Circuit court described the Massachusetts approach as ""perfectly traditional," *Id.* at 17, citing *Angel* v. *Bullington*, 330 U.S. 183 (1947).

The plaintiff argues that because he did not learn of the Bank's plans until three days before summary judgment was granted, his action, based upon this new knowledge, is not barred. The plaintiff further argues that because a reference to Mr. Willard's status as president of the Board of Trade was stricken from the *Manego II* pleading on defendant Bank's motion, the antitrust issues could not have been raised in the earlier proceeding.

Despite the plaintiff's contentions it is apparent that the present case concerns the same transaction or nucleus of fact that was adjudicated in *Manego II*. The mere fact that plaintiff failed to discover the Bank's plans until shorly before a final judgment does not affect its preclusive effect.[3] A judgment bars all claims prior to its entry. *Lawlor* v. *National Screen Service*, 349 U.S. 322, 328 (1955). Given the discovery and amendment provisions of the Federal Rules of Civil Procedure, plaintiff certainly could have obtained the necessary evidence to litigate his alternate theory in the first proceeding. Finally, the addition of new defendants in a subsequent action does not affect the preclusive effect of the judgment as to the original parties. *E.g. Scarpa* v. *Fair*, C.A. No. 82-2333, slip op. at 7 (D. Mass. April 11, 1983).

Accordingly, I rule that plaintiff's action against defendants Cape Cod Five Cents Savings Bank and David Willard is barred, and also rule that those defendants are therefore entitled to summary judgment.

Defendant Orleans Board of Trade

The Board of Trade moves for summary judgment on the following grounds: that the doctrine of *res judicata* bars the present action, that there is no genuine issue of material fact relating to the allegations of conspiracy, and that the alleged conduct had no adverse effect on interstate commerce.

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[3] The complaints in *Manego I* and *Manego II* both allege that an entertainment license was issued to the Bank after the denial of mr. Manego's application. Plaintiff claims only that he did not know what the Bank's plans were for the lecensed premises. Moreover, the events which plaintiff complained of took place primarily in the summer of 1979, years before judgment was entered.

Because the Board of Trade was not a party to *Manego II*, claim preclusion principles do not bar the present action. Furthermore, those members of the Board of Trade who were parties to the prior action may not rely on claim preclusion insofar as they are presently named as defendants in a different capacity. 1B J. Moore, Moore's Federal Practice ¶01411[3]. Issue preclusion, on the other hand, may bar relitigation of issues actually litigated and necessary to a prior judgment in a different cause of action, and may be asserted defensively by a stranger to the original action. *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979). Accordingly, the Board of Trade argues that the plaintiff should be estopped from relitigating the issue of conspiracy, claiming that it was resolved in favor of the defendants in *Manego II*.

Even an express finding that there was no conspiracy among thge defendants in *Manego II* would not bar the present case. Because the Board of Trade was not a party to the earlier action the existence of a conspiracy invloving the Board was not before the Court. I rule, therefore, that the prior judgment has no preclusive effect on this aspect of the present case.

The defendant's claim that there is no genuine issue of material fact is inexorably tied to what is commonly known as the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). Generally stated, this doctrine exempts, with certain exceptions, concerted attempts to influence the passagm or enforcement of laws from the sweep of antitrust legislation regardless of anticompetitive intent.

On the face of plaintiff's complaint, it is apparent that the allegations which relate to the Board of Trade involve attempts to influence governmental entities. Therefore, *Noerr-Pennington* applies unless the activity falls within one of the exceptions to the doctrine.

The complaint sets forth the following allegations. David Willard, an employee of the Bank and President of the Board of Trade, enlisted the "conspiratorial aid and assistance" of the

members of the Board to "conduct sham opposition" to Manego's applications. He was assisted in so doing by a majority of the Board of Selectmen acting as members of the Board of Trade, who also exerted pressure on members of the Board to block the plaintiffs plan to operate a disco in Orleans. The purpose of this plan was to assure that the plaintiff's proposed disco would not be in a position to compete with the Bank, which planned to offer similar entertainment at the arena near plaintiff's site. In January 1979, the Board of Trade, at a meeting chaired by Willard and attended by two of the three Orleans selectmen, unanimously voted to oppose the plaintiff's license applications. Subsequently, Willard reported this vote to the full Board of Selectmen during the January 11 hearing on plaintiff's license applications. Approximately 100 persons attended the meeting, many as a result of the defendants plan to oppose the applications.

The Board of Selectmen denied plaintiff's application for a liquor license on February 8, 1979, and on February 14, 1979 held a hearing on the amusement license application. After conducting a traffic study which was intended only as a spurious excuse for denying the application, the selectmen denied the amusement license application, unlawfully, on the basis "of noise and traffic considerations." The subsequent development of some twenty-five businesses in the area, plus the issuance of an entertainment license to the Bank's arena, plus the issuance of an entertainment license to the Bank's arena, attest to the spurious nature of the selectmen's reasons for denial. Furthermore, intersections in the area have been improved and upgraded to handle this incresed traffic.

In support of motions for summary judgment, defendants have resubmitted the affidavits of Herbert Wilcox, chairman of the Board of Selectmen, David Willard, and Charles Darling, a salesman at Nickerson Lumber Company, as well as excerpts from depositions of Willard, the plaintiff, and Paul Thiebert. Although several of the affidavits were prepared for

the earlier litigation in *Manego I* and *Manego II*, they are nevertheless pertinent to the issues in this case.

Herbert Wilcox states in his affidavit that he voted against the issuance of license because of the "likelihood of increased traffic hazards and noise pollution" and "gave some weight to the overwhelming sentiment of the citizens who [opposed the disco] and to the traffic committees report." As to the issuance of a similar license to the arena, Wilcox stated that the rink held a similar license previously which had not been renewed because of an oversight. He voted for issuance because of the rinks proven "benefits to the community" and because it had never caused inconvenience or concern.

Mr. Willard's affidavit states unequivocally that "I have never had, and, to my knowledge, no other Bank employee has had private conversations with any of the Selectmen concerning the proposed disco while Mr. Manego's applications. . . were under consideration," and "Nor did I. . . or the Bank conspire with Orleans officials to deny Mr. Manego the requested licenses [for] improper reasons."

Mr. Willard testified at deposition that two of the Selectmen were members of the Board of Trade, but did not recall if they were present at the meeting when the disco was discussed. He further testified that he did not urge members to attend the license hearing, and that he was, at the time, an officer of the Bank. A discussion was held as to the desirability of the disco, and all but two of the 70-75 persons present opposed the project. The next day, Willard attended the license hearing, and, as president of the Board of Trade, informed th4e selectmen of the vote.

Paul Thibert, who managed the rink for the Bank, testified at deposition that there was never any "discussion of any threat of competition [from Mr. Manego]" among the Bank or Board of Trade.

The substance of the materials offered by the defendants is that the selectmen denied the plaintiff's license applications

for permissible reasons, that there were no private conversations between Willard and the Selectmen, and that there was no discussion between the Bank and Board of Trade regarding Mr. Monego's disco as a potential competitor. These are denials of conspiracy from a selectman, the President of the Board of Trade, and an Officer and an employee of the Bank.

In support of his allegations, the plaintiff has produced several affidavits, extracts from depositions, and other evidence. The supplementary affidavit of Roger Hurlich, a builder reaffirms his earlier affidavit to the effect that the Bank had pressured Nickerson Lumber Company not to sell building supplies to Manego for the proposed disco. Even if taken as true, this evidence is not probative as to any conspiracy involving the Board of Trade. In response to an interrogatory requesting facts to support the allegations of conspiracy, the plaintiff answered "The meetings of the Board of Trade with David Willard as President held in January, February and subsequently in 1979, as set forth in the minutes of said meetings, and as testified to in deposition by David Willard." These materials reveal only that meetings were held, that two selectmen may have attended, and that the disco project was discussed and voted upon. When asked at deposition for the basis of his allegations of a conspiracy involving the selectmen, the plaintiff responded that "any time the selectmen attend a meeting and they were a member of the board of trade, that was illegal. That's conspiracy." The plaintiff did testify that an unidentified person had told him that officials of the Bank, Board of Trade and Board of Selectmen had met to oppose the disco, but he does not know the mans name. When asked what the Board of Trade did that was wrong, he said, "it was wrong for them to come out against me in opening a business."

The materials under consideration must be evaluated in light of the particular requirements of the substantive law in this area, i.e. whether there is a genuine issue of material facts which would allow the plaintiff to recover under an exception

to the *Noerr-Pennington* doctrine. The plaintiff contends that two exceptions apply: the so-called "sham" and "conspiracy" exceptions. The former, developed in a line of cases beginning with *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), applies where a party seeks not to influence public officials, but to "bar their competitors from meaningful access to adjudicatory tribunals and so to usurp the decisionmaking process." *Id.* at 512. *Trucking Unlimited* concerned a series of "baseless repetitive claims" designed "to discourage and ultimately to prevent the [plaintiffs] from invoking the processes of the administrative agencies and courts," *Id.* at 512. Subsequent developments have held that this exception also applies to a single suit filed for an improper purpose, such as generating publicity unfavorable to a competitor. *E.g. Energy Conservation* v. *Heliodyne*, 698 F.2d 386 (9th Cir. 1982). Activity disguised as petitioning which is simply an effort to interfere directly with a competitor is not protected under Noerr-Pennington. *Clipper Express* v. *Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 1234. Other types of activity which fall within the "sham" exception are misrepresentation, *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 275-79 (D.C. Cir. 1972); and threats or coercive measures to influence state officials, *Sacramento Coca-Cola Bottling co.* v. *Teamsters Local 150*, 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 1047 (1971). In order for the "sham" exception to apply:

> What is needed. . . is proof that the lobbyists subverted the integrity of the governmental process, that they effectively barred [the plaintiffs] access to these processes, or that the nature of these processes made their invocation something other than the "political activity" that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases to be beyond the scope of the Sherman Act.

Federal Prescription Service v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 262-63, (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

The plaintiff points to a suit filed by the Bank in opposition to the Selectmen's grant of a Building permit to Mr. Monego as such a "sham" abuse of process. He offers no evidence, or even the promise of evidence, that this suit was anything other than protected activity. Even with all inferences drawn most favorably to the plaintiff, there is no indication of misconduct which would rise to the level necessary to invoke the "sham" exception to *Noerr-Pennington*. At the core of this deficiency is the plaintiff's failure to produce any evidence that the lawsuit was instituted for an unlawful prupose. The fact that the suit was subsequently, withdrawn after the Bank's purported sale of the arena does not support an inference that the object of the suit was unlawful. Moreover, the "sham" was allegedly perpetrated by the Bank, and not the Board of Trade. Therefore, absent evidence that the Board of Trade conspired with the Bank as to this allegedly "sham" suit, it is irrelevant to the issue of the Board's immunity under Noerr-Pennington. The plaintiff has not offered such evidence, nor has he even alleged that a conspiracy existed with regard to the suit.

The plaintiff further contends that this case falls into the "sham" exception because he was deprived of "meaningfull access" to governmental entities because his experience with those entities has "been replete with animosity and conflicts of interest." In his argument, plaintiff relies heavily upon *Clipper Express* v. *Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1980), where summary judgment for defendants was reversed on appeal. That case is distinguishable from the present action in that the *Clipper* defendants admitted, for the purpose of summary judgment, that they had engaged in a conspiracy to file baseless protests for the sole purpose of eliminating competition. *Id.* at 1250-51. The Board of Trade has made no such admissions. Rather, its president has testified that the Board of Trade merely sponsored a discussion of the project and reported this discussion to the licensing authority at a public hearing. All that the plaintiff is able to show as to

his experience with the Board of Selectmen is that he was unsuccessful in his repeated attempts to obtain the necessary licenses.

It is clearly established that conduct genuinely intended to influence governmental action is immune from the sweep of antitrust law and that whether the effort is genuine or a sham is an issue of fact. *Id.* at 1253. Here, the plaintiff has produced no evidence in opposition to the defendants' affidavits and deposition testimony to show, or to raise an inference, that the Board of Trade engaged in anything other than protected petitioning before the Board of Selectmen. A party opposing a motion for summary jdugment may not rest on mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). I rule that the plaintiff has failed to do so.

Alternatively, the plaintiff invokes the "conspiracy" exception to *Noerr-Pennington* which applies where government officials participate with private individuals in a scheme to restrain trade. *E.G. Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3rd Cir. 1975). In support of this contention, the plaintiff relies upon the fact that two of the three members of the Board of Selectmen were also members of the Board of Trade, and that they were present at the Board of Trade meeting when Mr. Manego's proposal was discussed, and that other businesses were subsequently licensed in the same area.

Generally, summary judgment is inappropriate in cases involving conspiracy claims because the existence or nonexistence of a conspiracy is essentially a factual issue to be decided by the jury. *Adickes* v. *S.H. Kress*, 398 U.S. 144, 176 (1970). Summary judgment may also be inappropriate in antitrust cases where "motive and intent play leading roles." *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 472 (196?). There are, however, exceptions to the general rule. Where a moving party in an antitrust conspiracy case has shown that the facts relied upon in the opposing party's allegations are not

susceptible to the interpretation which he sought to give them, Rule 56(e) puts the burden on the opposing party to produce evidence in support of his allegations. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S 253, 289-90 (1957). Furthermore, a plaintiff may not rely upon the promise of evidence of conspiracy to be developed by cross-examination at trial. *Manego* v. *Cape Cod Five Cents Savings Bank, et al*, 692 F.2d 174 (1st cir. 1982), *Hahn* v. *Sargent*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

Without express evidence of a conspiracy involving the Orleans Selectmen, the plaintiff must rely on inferences which may be drawn from their presence at the Board of Trade meeting and their subsequent actions. In an analoguous situation, the Court of Appeals for the District of Columbia found that membership in an association was not evidence that regulatory officials were parties to an anticompetitive conspiracy. *Federal Prescription Service* v. *American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982). The regulatory officials in *Federal Prescription* were members of state pharmacy boards, and also members of a national pharmacists association which was engaged in a program of lobbying before the state boards to oppose licensing of mail-order pharmacies. The court of appeals reversed the district court finding of conspiracy as "clearly erroneous" and ruled that the defendants were entitled to judgment as a matter of law under the *Noerr-Pennington* doctrine. *Id.*

Therefore, I find that the Selectmen's membership in the Board of Trade is not probative of conspiracy. In addition, the subsequent grant of an entertainment license to the arena has been explained as a legitimate exercise of licensing authority. The plaintiff has failed to introduce any evidence to contradict this assertion.

Finally, I note that the type of conspiracy which the plaintiff must show to escape the *Noerr-Pennington* Doctrine differs

from that normally associated with antitrust litigation. Where the alleged conspirators are potential competitors or other market participants, conspiracy may be inferred from their market behavior, a situation which renders the determination particularly unsuitable for summary judgment. In this case the plaintiff alleges a conspiracy including governmental officials. Consequently, there is no market behavior to draw inferences from. Those facts which the plaintiff has submitted are either not probative as a matter of law or are explained by the unrebutted denials of parties to the alleged conspiracy.

I rule accordingly that even with all inferences drawn most favorably to the plaintiff, there is no genuine issue of material fact which, if proven by plaintiff, would constitute an exception to the *Noerr-Pennington* Doctrine. Therefore, I rule that the defendants are entitled to judgment as a matter of law on the antitrust count. Because this disposes of the federal question portion of the case, the state law claims are dismissed.

Order accordingly.

s/ ANDREW A. CAFFREY, CH. J.

ANDREW A. CAFFREY, CH. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
NO. 83-0045-C

ISAAC MANEGO,
PLAINTIFF,
v.
THE ORLEANS BOARD OF TRADE, ET AL,
DEFENDANTS.

ORDER
November 27, 1984

CAFFREY, CH. J.

In accordance with memorandum filed this date, it is ORDERED:

1. Summary judgment is granted for the defendants on Count 1.

2. Count 2 is dismissed.

s/ ANDREW A. CAFFREY, CH. J.

ANDREW A. CAFFREY, CH. J.

United States Court of Appeals
For the First Circuit

No. 85-1032

ISAAC MANEGO,

PLAINTIFF, APPELLANT,

v.

THE ORLEANS BOARD OF TRADE, ET AL.,

DEFENDANTS, APPELLEES.

No. 85-1033

ISAAC MANEGO,

PLAINTIFF, APPELLEE,

v.

THE ORLEANS BOARD OF TRADE, ET AL.,

DEFENDANTS, APPELLEES.

CAPE COD FIVE CENTS SAVINGS BANK
AND DAVID B. WILLARD,

DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. ANDREW A. CAFFREY, *U.S. District Judge*
Before
COFFIN, RUBIN * and BOWNES, *Circuit Judges.*

Charles Ray Weidman for Isaac Manego.

Laura L. Carroll with whom *Kenneth A. Cohen*, *Edward J. DeAngelo* and *Goodwin, Procter & Hoar* were on brief for Cape Code Five Cents Savings Bank and David B. Willard.

Albert P. Zabin with whom *Schneider, Reilly, Zabin, Connolly & Costello, P.C.* was on brief for The Orleans Board of Trade.

September 3, 1985

* Of the Fifth Circuit, sitting by designation.

BOWNES, *Circuit Judge*. In this, the third lawsuit arising out of the refusal of the Orleans Board of Selectmen to issue entertainment and liquor licenses for the operation of a disco, plaintiff Isaac Manego appeals the district court's grant of summary judgment for the defendants. This complaint alleges an illegal conspiracy to restrain trade under the Sherman Antitrust Act, 15 U.S.C. §1 (1982). Summary judgment for defendants David B. Willard and the Cape Cod Five Cents Savings Bank was granted under the doctrine of *res judicata*. Summary judgment for defendant Orleans Board of Trade and its members was granted on the ground that there was "no genuine issue of fact which, if proven by the plaintiff, would constitute an exception to the *Noerr-Pennington* Doctrine." We affirm.

In late 1978 and early 1979, Manego applied to the Orleans Board of Selectmen for entertainment and liquor licenses for a disco which he wanted to build on a vacant lot. The lot was located in a commercial district a few hundred feet from an ice skating rink. The rink at that time was primarily used by children for hockey and figure skating. During the winter there was also a "Disco on Ice" program for children under sixteen. As a result of a mortgage foreclosure, the Cape Cod Five Cents Savings Bank owned the rink from 1978 until July 1979. The vice-president of the bank, David Willard, served as general manager of the rink during this period. As owner of the rink, the bank was concerned about the close proximity of an establishment serving liquor to a recreational facility primarily patronized by children and the increased likelihood of automobile accidents involving inebriated drivers and children walking to and from the rink. The bank also had more general concerns about the presence of a disco in the area.

In January of 1979, there was a meeting of the Orleans Board of Trade, a private organization which functions as the chamber of commerce for the town. At that time, Willard was also the president of the Board of Trade. Membership in this organization is open to anyone who pays the $15.00 member-

ship fee. Willard raised the issue of the proposed disco at the meeting and after some discussion the membership voted to oppose the disco.

On January 11, 1979, a public hearing on Manego's liquor license application was held by the Orleans Board of Selectmen. Two of the selectmen, Gaston Norgeot and Thomas Nickerson, were also members of the Board of Trade. Over 100 people attended the meeting and expressed concern over the increased traffic and noise which would result from the disco as well as the effect of an establishment serving liquor in close proximity to the skating rink and the general effect of a disco on the atmosphere of the Town of Orleans. The Board of Selectmen received a petition containing 369 signatures opposing the disco and eleven letters, only two of which favored Manego's proposal. At the hearing, Willard announced that the Board of Trade had voted to oppose granting a license for the disco.

On February 8, 1979, the Selectmen denied Manego's application for a liquor license and Manego appealed this decision to the Board of Appeals, which met on February 8 and 14. Willard wrote a letter to the Board of Appeals setting forth the bank's opposition to the disco and its concern for the safety of the youngsters using the skating rink. Local counsel for the bank attended the Board of Appeals hearings. In late February, the Board of Appeals denied Manego's appeal.

On February 13, 1979, the Orleans Board of Trade held its monthly meeting and, acording to the minutes, mention was made of a hearing scheduled for the next day on Manego's amusement license application and of Manego's appeal of the denial of the liquor license application by the Selectmen. At the February 14 amusement license hearing, the Selectmen requested that the Town Traffic Safety Committee study the effects of the proposed disco. On February 22, 1979, the Selectmen turned down Manego's application for an amusement license.

In spite of these license denials, the Orleans Board of Appeals granted Manego a building permit in May of 1979. The bank then filed suit in Barnstable Superior Court challenging the issuance of this permit. In July of 1979, the bank sold the rink to Paul Thibert and sometime in August withdrew its superior court suit.

In March of 1979, the entertainment license of the rink expired; no renewal was sought until July of 1979, after Thibert purchased the rink. Because the license had lapsed, the application was treated as a new application and not a renewal and a public hearing was held. During that summer, a concrete floor had been poured at the rink to allow roller skating so the new application added roller skating to the proposed activities of the facility. In addition, the rink planned to offer a ballroom dancing program for adults featuring live music from the 1940's and refreshments in the nature of soft drinks. This, too, was an addition to the rink's activities. The rink's application was granted by the Selectmen. Among the reasons cited by the Selectmen for their approval were its unique status as the only skating facility on the Lower Cape, its use by young people as safe and "noncorrupting" entertainment and the lack of noise or traffic problems created by the facility.

In his first lawsuit arising out of these events, Manego sought a writ of mandamus in superior court to compel the Board of Selectmen to issue him liquor and amusement licenses, claiming that the denial was arbitrary and capricious (*Manego I*). His affidavit stated that the real reason for the denial of the license was based upon his race (Manego is black) and that this was demonstrated by the fact that six months later a license to operate a similar business was granted to a white person. This suit was dismissed upon the motion of the Selectmen.

Manego brought a second lawsuit in federal district court (*Manego II*), naming the Board of Selectmen, the Cape Cod Five Cents Savings Bank and Willard as defendants and claiming that they had conspired to deny him the licenses because of

his race in violation of 42 U.S.C. §§1981, 1983, 1985, 1986, 1988, 2000e et seq., §3605 of the Fair Housing Act, and Mass. Gen. Laws Ann. ch. 151, §4(3B). The claims under 42 U.S.C. §§2000e et seq., the Fair Housing Act, and the state law claims were all dismissed by the district court for failure to state a cause of action. As to the other claims, the Board of Selectmen moved for summary judgment on the grounds that these claims were barred by the doctrines of *res judicata* and collateral estoppel. The district court rejected this argument because "claims made here were neither fully argued or adjudicated in the state proceeding." As part of our appellate review of the district court's opinion in *Manego II*, we noted in passing that the "proper test for the applicability of *res judicata* is not whether the plaintiff in fact argued his constitutional claims in the state proceedings, but whether he could have." *Manego* v. *Cape Cod Five Cents Savings Bank*, 693 F.2d 174, 175 (1st Cir. 1982). We did not decide this issue, however, because we based our affirmation of the district court's grant of summary judgment upon the district court's determination that Manego had not provided even a "promise of evidence" that defendants were involved in a conspiracy to deny him the licenses because of his race.

The district court in *Manego II* found that despite being given an extra ninety days to produce some concrete, factual basis for his allegation of conspiracy, which defendants had affirmatively denied in their affidavits, Manego produced only the following: two personal affidavits explaining his theory and suggesting that direct evidence of the conspiracy would emerge under cross-examination and a third affidavit of a local building contractor employed by Manego reporting that he had heard that a lumber company had been told by the Bank not to supply Manego with materials and vaguely suggesting that his own relationship with the bank had been adversely affected by his association with Manego. The district court found that since Manego had not taken advantage of an "ample

opportunity" to take depositions or conduct any other form of discovery, his promise of evidence arising out of cross-examination was pure speculation, and that, furthermore, the affidavit of the building contractor could not be given any weight because it consisted primarily of hearsay.

In our opinion affirming the district court's grant of summary judgment on this ground, we said:

> In this case, plaintiff sought to infer the existence of an illegal conspiracy from the fact that the Selectmen granted a license to someone who was white but not to plaintiff, who was black. His inference is supported only by affidavit evidence of a general racial animus in the community. The fact that a group of private citizens, organized as the Orleans Board of Trade, voted unanimously to oppose his license and that members of the Board of Selectmen may have attended the meeting established nothing about the motivation of those individuals in opposing his license. The defendants countered his inference with an explanation of the difference between his disco and the skating rink which was granted a license. . . .
>
> In the face of this explanation, plaintiffs' [sic] promise that circumstantial evidence would emerge at trial could not withstand the defendants' motions for summary judgment.

Manego II, 692 F.2d at 176-77 (footnote omitted).

Despite the two rebuffs, Manego filed yet another lawsuit, this time against the bank, Willard, and the Orleans Board of Trade and its members. The third lawsuit (*Manego III*), which is the subject of this appeal, differed from *Manego II* in two respects: it dropped the Board of Selectmen as a defendant and added the Board of Trade; and it alleged a new legal theory, antitrust violations under the Sherman Antitrust Act, 15 U.S.C. §1. As evidence of a conspiracy between the bank and the Board of Trade to prevent the proposed disco from competing with the rink, Manego offered depositions, answers

to interrogatories, affidavits, and other documents which showed: that Willard was simultaneously an officer of the bank, general manager of the rink, and President of the Board of Trade; that various members of the Board present at the January and February meetings were also Selectmen; that the Selectmen denied the licenses after the Board of Trade voted to oppose their issuance; that the Selectmen subsequently granted an entertainment license to the rink which included live music, dancing and roller disco; and that the bank brought a lawsuit challenging a construction permit granted to Manego by the Orleans Board of Appeal but dropped the lawsuit after it sold the rink. According to Manego, the Board of Trade's interest in preventing the competition between the proposed disco and the rink was derived from the interest of its president, David Willard, who managed the rink for the bank.

Willard and the Bank moved for summary judgment on the grounds that these new claims were barred by the doctrine of *res judicata* and that, in any event, its conduct was protected by the first amendment under the *Noerr-Pennington* doctrine. The Board of Trade also moved for summary judgment under the doctrine of *res judicata* and additionally argued that there was no genuine issue of fact concerning the alleged conspiracy.

Defendants Cape Cod Five Cents Savings Bank And David Willard

As to Willard and the bank, the district court found that this third lawsuit was barred by the final judgment of the Court of Appeals in *Manego II* affirming the district court's grant of summary judgment to the Bank and Willard on civil rights claims. Applying a "transactional" approach to claim preclusion, the district court found that the facts forming the basis of Manego's claim of antitrust violations were the same as those which formed the basis of his earlier civil rights claims and that they were, therefore, barred by the final judgment against Manego on the civil rights claims. We agree.

While most of our previous cases have involved the preclusive effect of a previous *state* judgment on the merits[1] and have, therefore, been based upon state *res judicata* doctrine, we have indicated that the preclusive effect given to prior judgments by various states does not differ from the preclusive effect we would give to our own judgments. In *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56, 58 (1st Cir. 1985), we stated that "Rhode Island state law . . ., so far as we are aware, does not in connection with the principles of res judicata differ form the Restatement (Second) of Judgments or the law of Massachusetts or federal law." We then turned, as we have in many previous cases, to §24 of the Restatement (Second) of Judgments (1982) concerning the scope of claim preclusion. It thus appears that, *sub silentio*, we have come to view the Restatement rule as our own, even though we have never formally adopted it. *Cf. Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 104 S.Ct. 555 (1983) (citing §24 as a source of "elementary principles of res judicata"); *Marrapese* v. *State of Rhode Island*, 749 F.2d 934 (1st Cir. 1984) (citing §24 as indicative of the "present trend"). We now officially embrace it.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). This bar is limited, however, to cases arising out of the same cause of action or claim. *E.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). Our adoption of the Restatement (Second) approach commits us to a "transactional" definition of the underlying claim or cause of action:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules

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[1] *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985); *Casagrande* v. *Agoritsas*, 748 F.2d 47 (1st Cir. 1984); *Roy* v. *City of Augusta, Maine*, 712 F.2d 1517 (1st Cir. 1983); *Isaac* v. *Schwartz*, 706 F.2d 15 (1st Cir. 1983); *Lovely* v. *LaLiberte*, 498 F.2d 1261 (1st Cir.), *cert. denied*, 419 U.S. 1938 (1974).

> of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments §24 (1982).

Manego has argued that *Manego III* does not involve the same transaction as that which formed the basis for *Manego II* for three reasons: the nature of the conspiracy alleged is different; the parties to the conspiracy are different, although they do share common members; and there was no allegation in *Manego II* that the rink and disco would be offering similar entertainment and thus competing for the same customers.

As the district court pointed out, however, the mere fact that different legal theories are presented in each case does not mean that the same transaction is not behind each. Thus, the fact that one suit alleges a conspiracy with a racial animus and the other alleges a conspiracy with anticompetitive animus does not demonstrate that separate transactions are involved. Nor does it matter in this case that the named defendants are not identical. Even though the Board of Trade was not a defendant in *Manego II*, the fact that it met under the leadership of Willard and voted to oppose the disco was brought out[2]

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[2] In response to defendants' motion for a more definite statement in *Manego II*, Manego alleged

> that the aforesaid David Willard met, at various times during the periods January 1-January 11, 1979, with certain persons who are described as members of the Orleans Board of Trade, a voluntary association of businessmen and tradesmen in the Town of Orleans, in per-

and no new facts concerning conduct of the bank and the Board of Trade have been alleged.

We next consider whether the absence from *Manego II* of the allegation that the bank had plans to offer live music and dancing at the rink was sufficient to prevent the application of *res judicata*. The focus of the argument below was on whether Manego reasonably could have alleged this at the time of the racial discrimination suit. Manego claimed that he did not allege the "similar entertainment" facts in *Manego II* because he did not know of them until too late—three days before summary judgment issued. While it is the law that, if information is not reasonably discoverable, *res judicata* will not apply, *see Marrapese* v. *State of Rhode Island*, 749 F.2d 934 (1st Cir. 1984), the district court found that this exception was not available here because the "entertainment" facts could have been uncovered if Manego had been diligent in his discovery efforts. The court then went on to reason that because the legal theory which rested upon the "entertainment" facts *could have been* asserted during the prior suit, *res judicata* applied to bar its assertion in a later suit. We believe, however, that, once the reasonable discovery issue is resolved, the focus of a "transactional" analysis is not on whether a second claim *could* have been brought in a prior suit, but whether the underlying facts of both transactions were the same or substantially similar.

There will be situations where the factual bases for separate causes of action are different but intertwined and joining them together is both possible and convenient. A failure to do so,

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son, and in communication by telephone and in writing to discuss and act upon ways and means of organizing opposition to and preventing your plaintiff from obtaining licenses and other permits required by law for the construction and operation of a disco in the Town of Orleans, Massachusetts, and also that said members of the Orleans Board of Trade met together at various times during the period January 1-January 11, 1979 under the direction of the aforesaid David Willard, President of said association, and "voted" to oppose plaintiff's disco.

Our own opinion in *Manego II* reflects that we were well aware of the Board of Trade's actions. *See supra* p. 8.

however, will not justify the application of *res judicata*. A good illustration of this can be found in *Landrigan* v. *City of Warwick*, 628 F.2d 736 (1st Cir. 1980), where we held that a law suit charging the police with covering-up an alleged use of excessive force was not precluded by a prior lawsuit based on the actual use of excessive force. The plaintiff in *Landrigan* could have pursued both causes of action in the same lawsuit and it might have been very convenient to do so, since the alleged cover-up was intimately connected to the initial police misconduct. We found, however, that because the factual basis for the cover-up was distinct from the factual basis for the misconduct, the plaintiff was not required to do so. *Id.* at 741. This is to be contrasted with a situation in which the factual basis for each claim is essentially the same, so that not only *could* both claims be joined in one lawsuit, but *must* be joined or be barred by *res judicata*. A good example is again provided by *Landrigan*, where we held that a prior state court suit for assault and battery precluded a later federal suit under § 1983 for excessive use of force. *Id.* at 740.

The question, therefore, is whether the absence from *Manego II* of an allegation that the bank had plans to offer live music and dancing at the rink creates a transactional difference precluding the application of *res judicata*. Manego now argues that because an allegation that the rink and disco were competitors was essential to provide a motive for a conspiracy to restrain trade, the factual basis for such a conspiracy is distinctly different from that needed to show racial discrimination and that the antitrust action cannot be considered to arise from the same transaction or series of transactions. The answer to this question depends upon whether the underlying facts are the same regardless of the different motives, *i.e.*, racial discrimination and restraint of trade. Aside from motive, the conduct alleged is precisely the same, *i.e.*, the actions of the bank and Willard vis-a-vis the proposed disco. Each alleged conspiracy had the same practical end—keeping Manego from operating

the disco—and each used essentially the same means—denial of the licenses, intimidation of building suppliers, and an ultimately withdrawn lawsuit challenging a building permit. This is not a case like *Landrigan* where, although the events in question are closely connected in time and space, two relatively distinct sets of facts can be separated out as the bases for separate legal wrongs. We conclude, therefore, that the difference in motive for the conspiracy does not create a separate transaction. This means that once Manego chose to allege a conspiracy involving particular specified conspiratorial acts he was required to allege all possible motives for such a conspiracy and all facts necessary to support these allegations or lose the right to do so. Whether he took that risk by failure to discover the facts which diligent effort would have unearthed or by deliberate choice, the result is the same: the antitrust claim is barred by *res judicata* as to the bank and Willard.

Defendant Orleans Board of Trade

The Board of Trade moved for summary judgment on the grounds that the present suit was barred by the doctrine of *res judicata* and that there was no genuine issue of material fact which would allow Manego to fall under an exception to the *Noerr-Pennington* doctrine. The district court found that *res judicata* did not apply, but that Manego had not alleged facts sufficient to overcome the protection provided by *Noerr-Pennington*, and granted summary judgment for the Board of Trade. The district court's treatment of both these issues was excellent and we see no point in gilding the lily.[3] We affirm

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[3] We recognize that this case is different factually from *Federal Prescription Service* v. *American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982), in that Manego has alleged more than "mere membership" to support his conspiracy claim, but the inferences to be drawn from the Selectmen's attendance at the Board of Trade meeting are still insufficient in these circumstances to rebut the defendants' denials of conspiracy.

the grant of summary judgment to the Board of Trade and its members on the basis of the district court's opinion, *Manego* v. *Orleans Board of Trade*, 598 F. Supp. 231, 235-40 (D. Mass. 1984).

Affirmed.

United States Court of Appeals
For the First Circuit

No. 85-1032.

ISAAC MANEGO,

PLAINTIFF, APPELLANT,

v.

THE ORLEANS BOARD OF TRADE, ET AL.,

DEFENDANTS, APPELLEES.

No. 85-1033.

ISAAC MANEGO,

PLAINTIFF, APPELLEE,

v.

THE ORLEANS BOARD OF TRADE, ET AL.,

DEFENDANTS, APPELLEES.

CAPE COD FIVE CENTS SAVINGS BANK
AND DAVID B. WILLARD,

DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: September 3, 1985

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

s/ Francis P. Scigliano
Clerk

[cc: messrs. weidman, zabin, and ms. carroll]

TITLE 15, UNITED STATES CODE

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

No. A-420

In the Supreme Court of the United States

ISAAC MANEGO,
APPLICANT,
v.
ORLEANS BOARD OF TRADE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(xx),
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 31, 1986.

s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 30th
day of November, 1985.